

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

OHIO VALLEY ENVIRONMENTAL  
COALITION, INC., WEST VIRGINIA  
HIGHLANDS CONSERVANCY, INC., and  
SIERRA CLUB,

Plaintiffs,

v.

CIVIL ACTION NO. 2:13-5006

FOLA COAL COMPANY, LLC,

Defendant.

Huntington, West Virginia  
August 4, 2014

TRANSCRIPT OF PRETRIAL CONFERENCE  
BEFORE THE HONORABLE ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

J. MICHAEL BECHER, ESQ.  
APPALACHIAN MOUNTAIN ADVOCATES  
P. O. Box 507  
Lewisburg, WV 24901

For the Defendant:

M. SHANE HARVEY, ESQ.  
MATTHEW S. TYREE, ESQ.  
JENNIFER HUGHES, ESQ.  
JACKSON KELLY  
1600 Laidley Tower  
P. O. Box 553  
Charleston, WV 25322

Court Reporter:

Teresa M. Ruffner, RPR  
Sidney Christie Federal Building  
845 5th Avenue, Room 101  
Huntington, WV 25701  
(304) 528-7583

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1 Monday, August 4, 2014, at 10:30 a.m. in open court

2 THE COURT: All right. We've got this matter  
3 scheduled today for a pretrial.

4 As I understand it, there are two pending motions. I  
5 went over the integrated pretrial order. It appears that  
6 other than these two motions, there's really nothing that the  
7 Court need do before we can start the trial; is that right?

8 MR. HARVEY: I think that's right. I'm not sure --  
9 I want to make sure I understand which two motions you're  
10 referring to. I assume it's the motion to exclude Carrie  
11 Kuehn, the epidemiologist, and then perhaps our motion to  
12 strike. Is that --

13 THE COURT: Yes, that's the only two I'm aware of.

14 MR. HARVEY: Okay. With respect to the second  
15 motion, Mr. Becher approached me this morning. We were  
16 talking. We may be able to resolve that without having the  
17 Court hear that issue today if that's okay.

18 THE COURT: Probably. But how are you trying to  
19 resolve it?

20 MR. BECHER: We would propose a compromise, Your  
21 Honor. There were two studies. Just the supplemental expert  
22 reports, there are two studies that came out after the reports  
23 and after depositions. We had submitted supplemental expert  
24 reports that deal with those studies.

25 Our view is that they're both in line with the original

1 opinions of our experts. However, we do recognize that one is  
2 more tangential perhaps than another and we may compromise  
3 by --

4 THE COURT: All right. How soon do you think you  
5 can either resolve it or tell me that you can't?

6 MR. HARVEY: Perhaps by the end of the day --

7 THE COURT: Okay.

8 MR. HARVEY: -- or by tomorrow.

9 THE COURT: All right. Well, then, we'll defer  
10 further consideration of that matter until you can report back  
11 to Amanda, my clerk, about whether or not it's resolved.

12 Then with respect to the plaintiffs' motion to strike --

13 MR. BECHER: Your Honor, could I make one more  
14 matter on the pretrial order? I guess it's not completely  
15 worked out yet, but we may be able to slim down the witness  
16 list by one extra witness as well --

17 THE COURT: Okay. That would be great.

18 All right. Well, I've read --

19 (The Court and court reporter conferred privately off the  
20 record.)

21 THE COURT: The power went off in this building and  
22 we're on a generator and I'm not sure -- and the microphones  
23 didn't seem to be working. Bear with us just a minute and  
24 we'll see if Terry can figure it out.

25 All right. Well, the microphones aren't going to work,

1 so make sure that you speak slowly and loudly so that my court  
2 reporter can hear you.

3 All right. Then with regard to --

4 THE CLERK: Now it's on.

5 THE COURT: It just came on.

6 With regard, then, to the plaintiffs' motion, I've read  
7 everything, read the deposition, read the report.

8 Is there any further argument that the parties want to  
9 offer or summarize?

10 MR. BECHER: Briefly, Your Honor, if I may.

11 THE COURT: Go ahead.

12 MR. BECHER: Under Rule 702 an expert must be  
13 qualified by knowledge, experience, skill, or training; and it  
14 must apply that knowledge, skill, experience, or training to  
15 the facts and methodologies of the case.

16 We have a couple of problems with Miss Kuehn's testimony.  
17 First, she clearly points and testifies to matters outside of  
18 her knowledge and skill base. She makes statements such as  
19 her review of the DEP data confirm that temperatures strongly  
20 associated with the viability of sensitive invertebrate, and  
21 there's an abundance of information and other factors that may  
22 explain the relationship between conductivity and the WVSCI  
23 score.

24 Miss Kuehn is not an ecologist and she freely admits  
25 that. These statements are clearly within the field of

1 ecology and not within her relevant expertise of epidemiology  
2 or statistics. In fact, when she was asked to support these  
3 statements, she simply pointed to graphs which she had copied  
4 verbatim from Dr. Menzie, defendant's other proffered expert  
5 witness's expert report.

6 She admitted in deposition she had done no analysis of  
7 that data herself, and in fact deferred all questions about  
8 those analyses to Dr. Menzie. Because of this, she not only  
9 testifies to matters on ecology, but the limited relevant  
10 experience she may have to analyze data was not applied to  
11 generate these graphs and these exhibits, and we feel that  
12 those should clearly be excluded.

13 Because she did not analyze the facts and data that were  
14 directly relevant to this case, Miss Kuehn goes to general  
15 challenges of the causal method used by EPA in developing the  
16 benchmark. We point out this is the very causal mechanism  
17 that the defendant's other expert, Dr. Menzie, in a similar  
18 case referred to as basically the gold standard and criticized  
19 plaintiffs' experts for not following.

20 I want to make two points. The first is argued by  
21 plaintiffs in that same case. While we do believe this is a  
22 good method, we do not believe it's the only method. We  
23 believe that it allows for flexibility, and the science itself  
24 is flexible. It does not need some sort of rigid analysis to  
25 progress and determine things like causation of two factors.

1           What Miss Kuehn tried to do is point out that this method  
2           is different from her own field of epidemiology. Plaintiffs  
3           recognize that there are principles of epidemiology that have  
4           been adopted to form this causal mechanism used by EPA.  
5           However, it has been adapted. It has not been taken verbatim.  
6           And those adaptations are critical. And that's what  
7           Miss Kuehn cannot testify about.

8           She can explain to us why -- or, excuse me -- how this is  
9           different from epidemiological methods, but she has no insight  
10          or background in ecology to explain why those differences may  
11          matter or why they may or may not be appropriate.

12          This gap in her knowledge became evident during  
13          deposition when she admitted she could not do a causal  
14          analysis of the relevant factors herself, that she would need  
15          to rely on an ecological expert such as Dr. Menzie or  
16          plaintiffs' experts.

17          She struggled to give examples of what she would have  
18          done differently with the data that was available, and when  
19          pressed, only -- could only answer that there was not lab data  
20          to confirm this relationship. And I think this fixation with  
21          lab data, as we pointed out in our brief, shows the key  
22          difference in Miss Kuehn's field and the relevant field here.

23          In a field like ecology, studying complicated systems,  
24          it's not always possible to replicate the environmental  
25          conditions in a lab. Because of that, the field of ecology

1 has principles and methods that are adapted to account for  
2 that limitation. That does not mean the science is wrong.  
3 That does not mean the lab data cannot be incorporated or it's  
4 helpful when it is available, but there are many situations  
5 when it is not available, and that does not discount the  
6 science and the findings of that science. And that's  
7 something that Miss Kuehn just simply does not seem to grasp.

8 I'll leave it at that. Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 Mr. Harvey?

11 MR. HARVEY: Thank you, Your Honor.

12 Your Honor, the Clean Water Act is over 40 years old; and  
13 in its entire history, EPA has always used laboratory data to  
14 set water quality standards. Essentially it takes test  
15 organisms and exposes them to pollutants in a lab, studies the  
16 reaction, and it sets a standard.

17 The conductivity benchmark was different. For the first  
18 time ever, the EPA based conclusions on observational data,  
19 not data generated in a laboratory. They took data gathered  
20 by agencies like the DEP, as the Court is well aware, ran  
21 correlation analyses on that data, looked at confounding  
22 factors, and reached conclusions regarding causation.

23 To do this, which was a first for the agency, it relied  
24 upon principles of epidemiology, and it was very explicit in  
25 doing so. If you read our response, you will see throughout

1 the benchmark and the supporting papers, they say on multiple  
2 occasions we're using principles of epidemiology. We're using  
3 epidemiological methods. We are borrowing from human health  
4 epidemiology. And that was appropriate, because that is what  
5 epidemiologists do. They take observational data and they  
6 address issues of general causation.

7 The link between smoking and lung cancer was established  
8 by epidemiologists studying observational data. It's a  
9 well-accepted science, and EPA was right to rely upon it.  
10 It's also a very rigorous science. It took decades to  
11 establish the link between smoking and lung cancer.

12 EPA -- I mean, epidemiologists not only had to show that  
13 there was a correlation between the two, they spent decades  
14 determining whether or not there were confounding factors like  
15 alcohol use or urbanization that had been taken into account.

16 The process is very rigorous. The courts have accepted  
17 it; and if it's done right, it can give you a correct  
18 conclusion. If it's done incorrectly, it can give you a  
19 spurious conclusion. And there are many examples of those  
20 over the last 50 years.

21 So we asked a trained epidemiologist to look at what EPA  
22 had done, to see if they had properly borrowed from  
23 epidemiology and used proper epidemiological methods. She  
24 found that their work and the work of Dr. King was severely  
25 lacking in that regard. The way they treated confounding



1 factors was inappropriate and not the way an epidemiologist  
2 would conduct the analysis.

3 Plaintiffs have shown us nothing to suggest that for  
4 ecology the rules are different, that somehow you can use a  
5 half-baked analysis for ecology. The rules are the same. You  
6 can reach statistically inappropriate conclusions if you apply  
7 the wrong methodology to ecological data.

8 The plaintiffs do not want the Court to hear this  
9 testimony. Their expert is not a trained epidemiologist. He  
10 is not a trained statistician. Dr. King is an ecologist. He  
11 will tell you that the benchmark was rigorous and  
12 peer-reviewed, but he does not have the background to spot  
13 errors in the benchmark or in his own analysis in our view.

14 We think the testimony from Miss Kuehn, a trained  
15 epidemiologist, will inform the Court as to whether errors  
16 were made. In fact, we think it would be wrong for the Court  
17 to reach conclusions about causation if there are still open  
18 questions about issues like confounding.

19 The plaintiffs, to avoid the testimony of Miss Kuehn,  
20 have thrown the Court a curve ball. They have suggested that  
21 she should not be allowed to testify because she is not an  
22 ecologist, to which we respond, so what?

23 The epidemiologists who established the link between  
24 smoking and lung cancer were not oncologists. They were not  
25 medical doctors. Sir Bradford Hill, the most famous and the

1 lead epidemiologist, was a statistician. That is what  
2 epidemiologists do. They look at observational data. They  
3 run statistical analyses to see if you can infer causation  
4 from that data. They do not have to be experts in the  
5 underlying field. Normally, they are not. They're not  
6 medical doctors. They're trained in the field of epidemiology  
7 and statistics. That is what Miss Kuehn is.

8 We think her testimony is highly relevant and very  
9 reliable and appropriate under the Rules of -- under Rule 702  
10 of the Rules of Evidence.

11 The plaintiffs say that she was fixated on laboratory  
12 data. She does not believe that he can establish causation  
13 without it. I don't know if you read the entire deposition,  
14 but I sat there and what I saw was simply a difference in  
15 semantics or terminology.

16 Here is the Federal Reference Manual on Epidemiology. It  
17 says as follows: Epidemiology -- and this is on page 598,  
18 Third Edition.

19 Epidemiology cannot prove causation. Rather causation is  
20 a judgment for epidemiologists and others interpreting the  
21 epidemiological data.

22 I think all Miss Kuehn was saying is that philosophically  
23 you cannot use epidemiology to prove anything. You can infer  
24 it from all the lines of evidence, but you cannot prove it.  
25 If you want to prove it, you need laboratory data. But I did

1 not take her to say that ecology was some inferior science or  
2 epidemiology was superior in some way. She simply said, look,  
3 EPA borrowed principles of epidemiology in establishing the  
4 benchmark. They did it incorrectly.

5 THE COURT: All right.

6 MR. HARVEY: Thank you.

7 THE COURT: Mr. Becher, do you want a brief reply?

8 MR. BECHER: Briefly, Your Honor.

9 THE COURT: Go ahead.

10 MR. BECHER: Just a couple of points. First, it may  
11 be a fairly minor point in the motion, but I do want to  
12 address the criticism of Dr. King as not being expert in  
13 statistics. In deposition and also in front of this Court  
14 back in December, Dr. King was very careful to say that he was  
15 an expert in ecological data analysis because he thought  
16 statistics was too broad a field for anyone to be expert in.

17 In fact, Dr. King had, beyond taking several statistics  
18 courses in undergrad and grad school, teaches statistic  
19 courses and even designed a well-accepted and well-used  
20 statistical method in the field of ecology.

21 I just want to make sure -- I know we'll get to  
22 qualification later, but I did want to respond to that  
23 criticism.

24 Also, when it comes to the data in the benchmark, I think  
25 what is important here is to recognize that the benchmark,

1 while it borrowed from epidemiological principles, adapted  
2 those methods to the relevant field of ecology. It was  
3 created by EPA, reviewed by several of the EPA scientists  
4 before being submitted to a Scientific Advisory Board for EPA  
5 and being promulgated that way.

6 Since then, these methods have been reviewed by peer  
7 reviewers in independent published articles. And if  
8 Miss Kuehn wants to, you know, criticize the entire field for  
9 those oversights that she finds from, you know, misapplying  
10 epidemiological principles, I mean that is one thing, but to  
11 be able to criticize the adaptation of that to the relevant  
12 field is something we do not believe she should be able to do.

13 I also do want to briefly address the issue of smoking  
14 and lung cancer. It did, of course, take, you know, decades  
15 to improve -- or, excuse me -- to prove the association  
16 between smoking and lung cancer.

17 During those decades, many, many people died, but I think  
18 there was rigorous science and evidence supporting that link  
19 well before that could have prevented that. And I would  
20 submit that it was obfuscation that caused the link to take so  
21 long to be made. And that's something we definitely want to  
22 avoid in matters of science going forward, especially when  
23 there are significant problems that result.

24 THE COURT: All right. Thank you.

25 Well, as I've indicated, I've read through everything,

1 including the deposition and the report, and I appreciate the  
2 arguments made here today.

3 I'm going to deny the motion. I think that Miss Kuehn is  
4 permitted -- should be permitted to testify as an  
5 epidemiologist. It's clear that the benchmark developed by  
6 EPA relies in part upon epidemiological methods, and I think  
7 that it's fair for the defense to criticize those methods. It  
8 may well be that the rebuttal to that criticism is that you  
9 can't apply those principles the same way Miss Kuehn would in  
10 the field of ecology, but I think that's for the experts to  
11 argue about and for the Court to hear testimony about.

12 I would not want to preclude that debate. So I'm going  
13 to deny the motion, and she'll be permitted to testify.

14 You've indicated that you might have some stipulation  
15 that would reduce by one the number of witnesses. If that's  
16 not the case, how long is it going to take to have the  
17 plaintiff put on its case?

18 MR. BECHER: We were discussing this among counsel  
19 this morning, Your Honor, and had basically come to the  
20 agreement somewhere between three and four days. Hopefully  
21 with this stipulation, we can keep it at three.

22 THE COURT: Are you saying three days to four days  
23 to put your case on?

24 MR. BECHER: No, Your Honor --

25 THE COURT: Total?

1 MR. BECHER: -- total.

2 THE COURT: All right. At this point, then, how  
3 many witnesses do you expect to have, assuming no stipulations  
4 to reduce the number?

5 MR. BECHER: Assuming no stipulation, we would have  
6 three witnesses on direct, and then two of those would also be  
7 rebuttal witnesses, and then one additional rebuttal witness.  
8 So four witnesses total.

9 THE COURT: And then what about the defense?

10 MR. HARVEY: Two witnesses.

11 THE COURT: The two experts?

12 MR. HARVEY: Yes, Your Honor.

13 THE COURT: All right. Well, one of the reasons I'm  
14 asking is I've got another case that is also scheduled for  
15 trial that week. The parties are coming in here about 11:30  
16 for the pretrial conference in that. I'm not sure yet how I'm  
17 going to adjust or deal with this. It may be that it affects  
18 how quickly we can start this trial or not.

19 I think that the other case, it will be a jury trial, and  
20 it will be relatively brief, certainly no more than two days,  
21 but I'm not sure yet.

22 So I just bring that to your attention. If it looks like  
23 the trial date -- commencement date is going to be affected by  
24 this other matter, then I'll just have to let you know as soon  
25 as I can. I know you've got experts scheduled to be in that

1 week, so I'll certainly try to avoid affecting this trial  
2 date.

3 You mentioned at the beginning that there might be some  
4 agreement that would moot the defendant's motion with respect  
5 to the supplemental reports.

6 Is there any chance that as a result of those  
7 supplemental reports and the defendant's objection that you  
8 all will want to postpone the trial some short time while  
9 these new reports are analyzed and the defendant can rebut?

10 MR. BECHER: Your Honor, with respect to that and  
11 with respect to any delay of the trial generally, I think  
12 plaintiffs would ask that we try to make all efforts to have  
13 the trial happen at all time -- on time. Of course, I realize  
14 the Court has a congested docket, but we do have multiple  
15 experts coming in from various parts of the country, and they  
16 are by and large academics who are much more free during the  
17 summer than later on during the academic year.

18 THE COURT: Well, all right.

19 MR. HARVEY: Not much to add, Your Honor. If we can  
20 work out that issue, my sense is there would be no reason to  
21 move the trial date. If we can't --

22 THE COURT: All right. So I expect you to report  
23 back let's say by the end of business tomorrow or sooner  
24 obviously if you've resolved the second -- the defendant's  
25 motion. And if you haven't, then my guess is that I'm going

1 to convene some type of a hearing later this week, perhaps by  
2 telephone to accommodate everybody's schedules, but we'll take  
3 that up and I'll have a much better idea also about whether  
4 this other case is even going to go to trial or not.

5 All right. Is there anything else that we need to  
6 address?

7 MR. HARVEY: One short question, Your Honor, that  
8 may make it easier on us later. The exhibits in this case are  
9 cumbersome. The last trial we put them in a notebook. My  
10 preference would be, where we can, to put those exhibits on  
11 the screen for the Court's review. And if the Court or the  
12 parties want to refer to the notebook, they can, but not to  
13 break the flow if we can avoid it by using electronic means.

14 THE COURT: That's fine, and it probably would work  
15 better. It's awful hard for us to appear -- and I know it is  
16 for you as well -- to have all these notebooks and have to go  
17 searching through the things in the notebook by exhibit  
18 number.

19 So I'm certainly amenable to doing it some different way.  
20 It was really difficult for me to follow, but it would also  
21 seem to me that -- I realize when you prepare these notebooks  
22 in advance, you really can't be sure at what point in the  
23 testimony they're going to be addressed, and so they're not  
24 necessarily in any sort of chronological, in the terms of the  
25 presentation, any chronological order. It may be better if --



1           MR. HARVEY: We're learning from the last trial.  
2 We'll try to do better in that regard, and my promise to the  
3 Court and Mr. Becher is if we are moving too fast and someone  
4 actually wants to see the paper copy of the exhibit in the  
5 notebook, we can always slow down.

6           THE COURT: Well, and to be honest with you, while I  
7 certainly also like to use the monitors and rely upon them, I  
8 really like to have the documents up here too. So I'm going  
9 to want to have copies of all these.

10           MR. HARVEY: We'll try to do the best we can with  
11 the pace.

12           THE COURT: All right. Is there anything else we  
13 need to address, then?

14           MR. BECHER: No, Your Honor.

15           THE COURT: You'll need to speak with Terry at least  
16 the week before the trial to talk about using the electronic  
17 system. I know you've all used it, but we make everybody go  
18 through it again before the trial just to make sure that we  
19 don't run into any glitches. And since we aren't trying many  
20 cases, we're not using this system regularly, and so  
21 sometimes, you know, we haven't used it for a few months and  
22 we've got a trial and we find out something is wrong and --

23           MR. HARVEY: Terry has been extremely helpful, and  
24 we wouldn't think of showing up here without having a trial  
25 run.

1           THE COURT: All right. All right. If there's  
2 nothing further, then, we'll stand in recess and expect to  
3 hear back from you by tomorrow afternoon sometime.

4           (Hearing concluded at 10:59 a.m.)  
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21           I, Teresa M. Ruffner, certify that the foregoing is a  
22 correct transcript from the record of proceedings in the  
23 above-entitled matter.  
24

25           /s/Teresa M. Ruffner

May 15, 2015